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MAR 30 2004

FRESNO COUNTY  
SUPERIOR COURT

10 SUPERIOR COURT OF CALIFORNIA  
11 COUNTY OF FRESNO, CENTRAL DIVISION

12 PEOPLE OF THE STATE OF CALIFORNIA,

13 Plaintiff,

14 v.

15 MARCUS WESSON,

16 Defendant.

CASE NO. F049017856

THE FRESNO BEE'S OPPOSITION  
TO SEALING OF SEARCH  
WARRANT

W04912037-9  
HEARING W04912038-7  
DATE: TBA W04912039-5  
TIME: TBA  
DEPT: TBA

17 TO THE PEOPLE OF THE STATE OF CALIFORNIA:

18 I. INTRODUCTION.

19 The McClatchy Company, doing business as *The Fresno Bee* ("*The Fresno Bee*"),  
20 submits this memorandum of points and authorities in support of its opposition to any proposed  
21 order sealing search warrant documents in connection with the Marcus Wesson investigation.

22 *The Fresno Bee*, as a member of the news media, brings its opposition on the basis  
23 of its First Amendment, statutory, and common law rights to open criminal proceedings and records.  
24 *The Fresno Bee* has standing as a member of the public at large to enforce rights of public access to  
25 judicial proceedings and documents filed in those proceedings, as recognized by the courts. *The*  
26 *Fresno Bee* is not certain of the full extent of the records which may be among those the court is  
27 asked to seal, but *The Fresno Bee* is informed that the records may include multiple search warrants,  
28 search warrant affidavit, and search warrant return and other materials.

1           *The Fresno Bee* is further informed that the subject search warrants have been fully  
2 executed and the returns are to be filed shortly.

3  
4           **II.     THE PRESS HAS STANDING TO OPPOSE SEALING**  
5           **COURT RECORDS.**

6           Decisions recognizing expressly, or implicitly the press' standing to appear in  
7 opposition to orders impinging on the First Amendment rights of the press and public to attend court  
8 proceedings and review court records are numerous. (See, e.g., *Press-Enterprise v. Superior Court*  
9 (*Press Enterprise II*) (1986) 478 U.S. 1; *Press-Enterprise v. Superior Court (Press Enterprise I)*  
10 (1984) 464 U.S. 501; *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596; *Richmond*  
11 *Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555.)

12           The California courts have recognized that the news media have the right to adequate  
13 notice and an opportunity to be heard in opposition to the closing of presumptively open records or  
14 proceedings. (See, e.g., *Tribune Newspapers West, Inc. v. Superior Court* (1985) 172 Cal.App.3d  
15 443 [granting petition for mandate where news media not given adequate notice of closure of  
16 juvenile fitness hearing].)

17           Based on these decisions, *The Fresno Bee* asserts its interest in and right to oppose  
18 any sealing and to rebut the proponent's evidentiary showing, if any.

19  
20           **III.    PENAL CODE SECTION 1534 PROVIDES THAT THE**  
21           **PUBLIC SHALL HAVE ACCESS TO WARRANTS 10**  
22           **DAYS AFTER ISSUANCE.**

23           By statute, the documents and records of the court relating to the warrant shall be  
24 open to the public after the warrant has been executed or the expiration of 10 days after issuance.  
25 Penal Code section 1534 (a) provides:

26           (a) A search warrant shall be executed and returned within 10 days  
27 after date of issuance. A warrant executed within the 10-day period  
28 shall be deemed to have been timely executed and no further showing  
of timeliness need be made. After the expiration of 10 days, the  
warrant, unless executed, is void. The documents and records of the

1 court relating to the warrant need not be open to the public until the  
2 execution and return of the warrant or the expiration of the 10-day  
3 period after issuance. Thereafter, if the warrant has been executed,  
the documents and records shall be open to the public as a judicial  
record.

4 (Emphasis added.)

5 In California, the right of public access to search warrant documents following  
6 execution and return of the warrant is statutorily mandated by Penal Code section 1534. (*People v.*  
7 *Tockgo* (1983) 145 Cal.App.3d 635, 641-642 [193 Cal.Rptr. 503] [affidavit in support of the search  
8 warrant is a "public document" and inclusion of the information in such public document "waived  
9 any privilege," as to that information].) With respect to the warrants to which *The Fresno Bee* seeks  
10 access, it is believed the 10 days has expired and the documents should be made available to the  
11 public.

12  
13 **IV. PRESS ENTERPRISE II AND RULE OF COURT 243.1**  
14 **REQUIRE A SHOWING TO BE MADE PRIOR TO**  
15 **SEALING COURT RECORDS.**

16 **A. Court Proceedings And Documents Filed Therein Are**  
17 **Presumptively Open To The Public.**

18 Openness in criminal trials "enhances both the basic fairness of the criminal trial and  
19 the appearance of fairness so essential to public confidence in the system." (*Press Enterprise II*, 478  
20 U.S. at p. 9; see, generally, *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th  
21 1178 [reviewing history of constitutional and common law right of access to both criminal and civil  
22 proceedings and records]; see also *Alarcon v. Murphy* (1988) 201 Cal.App.3d 1, 5-7 [recognizing  
23 arrest warrant and the affidavit are public records; disclosure does not violate state privacy right].)

24 Under *Press Enterprise II*, such presumptively open records cannot be sealed unless:

25 specific, on the record findings are made demonstrating that "closure  
26 is essential to preserve higher values and is narrowly tailored to serve  
27 that interest." [citation omitted]. If the interest asserted is the right  
28 of the accused to a fair trial, the preliminary hearing shall be closed  
only if specific findings are made demonstrating that, first, there is a  
substantial probability that the defendant's right to a fair trial will be  
prejudiced by publicity that closure would prevent and, second,

1 reasonable alternatives to closure cannot adequately protect the  
2 defendant's fair trial rights.

3 (478 U.S. at pp. 13-14.) The burden is on the party seeking closure to support the required findings  
4 with evidence. (*Id.*)

5 The California courts have recognized these rights of access to court records:

6 [C]ourt records are public records, available to the public in general,  
7 including news reporters, unless a specific exception makes specific  
8 records nonpublic. [Citation.] To prevent secrecy in public affairs  
9 public policy makes public records and documents available for  
public inspection by newsmen and members of the general public  
alike. ... [¶] Traditional Anglo-American jurisprudence distrusts  
secrecy in judicial proceedings and favors a policy of maximum  
public access to proceedings and records of judicial tribunals.

10 (*Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 114-115 [quoting *Estate of Hearst*  
11 (1977) 67 Cal.App.3d 777, 782, 784].)

12 **B. California Rules Of Court Place The Burden Of**  
13 **Justifying The Sealing Of Records On The Proponent.**

14 California Rules of Court rule 243.1 now contains the *Press Enterprise II* standards  
15 for sealing records. The court may order that a record be filed under seal only if it expressly finds  
16 that:

- 17 (1) There exists an overriding interest that overcomes the right of public access  
18 to the record;
- 19 (2) The overriding interest supports sealing the record;
- 20 (3) A substantial probability exists that the overriding interest will be prejudiced  
21 if the record is not sealed;
- 22 (4) The proposed sealing is narrowly tailored; and
- 23 (5) No less restrictive means exist to achieve the overriding interest.

24 In addition, rule 243.2(b) requires:

25 A party requesting that a record be filed under seal must file a motion  
26 or an application for an order sealing the record. The motion or  
27 application must be accompanied by a memorandum of points and  
28 authorities and a declaration containing facts sufficient to justify the  
sealing.

///

1 In California, by statute, there has been a historical right of public access to search  
2 warrants and affidavits as a potential check on abuse of governmental, including judicial power.

3 Sealing the requested warrants and associated documents is inconsistent with Penal  
4 Code section 1534 and the California Rules of Court, in violation of the public's statutory, common  
5 law, and First Amendment rights of access.

6  
7 **V. NO RECOGNIZED EXCEPTION SUPPORTS**  
8 **SEALING OF THE WARRANTS.**

9 The exception to Penal Code section 1534's requirement that search warrant  
10 documents be available for public scrutiny 10 days after issuance does not apply in this case. The  
11 exception recognized by the case law is that an affidavit may be sealed to the extent necessary to  
12 protect the confidentiality of the informer's identity. (See *People v. Hobbs* (1994) 7 Cal.4th 948,  
13 971.) There has been no mention of the involvement of confidential informants in the Marcus  
14 Wesson investigation.

15 The court in *Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1302, applied the  
16 *Press-Enterprise II* test to determine whether the evidence seized pursuant to a warrant was also  
17 subject to public inspection and determined that the evidence itself was not subject to public  
18 disclosure. Here, however, *The Fresno Bee* seeks access to the documents and records of the court,  
19 not the fruits of the search. These documents are, by statute, open to the public 10 days after the  
20 warrant is issued. *Oziel* also required notice to be given to the person whose premises were  
21 searched.

22 A pre-indictment case, *PSC Geothermal Services Co. v. Superior Court* (1994) 25  
23 Cal.App.4th 1697, 1714, held that a court could also seal those portions of an affidavit shown to be  
24 protected by Evidence Code sections 1040 and 1042, the official information privilege. The official  
25 information privileges apply only to information "acquired in confidence." As one court noted, for  
26 example, "Manifestly it cannot be maintained that voluntary statements of a criminal suspect to  
27 investigating authorities are 'confidential.'" *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 124-

28 ///

1 126; see also, e.g., *People v. Tockgo* (1983) 145 Cal.App.3d 635, 641-42 [rejecting application of  
2 section 1040 privilege to information disclosed in warrant affidavit, a public document]. )

3 The court held in *PSC Geothermal* that an affidavit cannot be sealed under the official  
4 information privileges unless the court first undertakes the "two-stage analysis of confidentiality and  
5 public interest necessary to support the sealing of the affidavit." The more recently adopted rule of  
6 court, rules 243.1 and 243.2, also apply in this case.

7 Here it is unknown if there is any showing to support the requested sealing of the  
8 search warrant. Certainly no motion to seal was noticed or docketed, and to date, the news media has  
9 had no opportunity to appear in opposition.

10  
11 **VI. CONCLUSION.**

12 The court should refuse to enter any sealing orders without its proponent having made  
13 the showings required by *Press Enterprise II* and California Rules of Court, rule 243.1. Further, the  
14 court should order any proponent to make a noticed, docketed motion supported by a memorandum  
15 of law and evidence if it wishes to seal some portion of the documents and affidavits. Otherwise,  
16 pursuant to Penal Code section 1534, these documents are presumptively open to the public to the  
17 extent now that more than 10 days have passed since any warrant was issued.

18  
19 DATED: March 30, 2004.

20 DIETRICH, GLASRUD, MALLEK & AUNE

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22  
23 BY: Bruce A. Owdom  
24 BRUCE A. OWDOM  
Attorneys for The McClatchy Company,  
doing business as *The Fresno Bee*

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF FRESNO**

I am employed in the County of Fresno, State of California. I am 18 years of age or over and not a party to the within action; my business address is 5250 North Palm Avenue, Suite 402, Fresno, California, 93704.

On March 30, 2004, I served the within document described as ***THE FRESNO BEE'S OPPOSITION TO SEALING OF SEARCH WARRANT*** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope at Fresno, California, addressed as follows:

**LARRY A DONALDSON ESQ\*  
CITY ATTORNEY POLICE ADVISOR  
FRESNO CITY ATTORNEY'S OFFICE  
2600 FRESNO ST  
FRESNO CA 93721-3602  
Facsimile: (559) 488-1084**

\_\_\_\_\_ (BY MAIL) depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

**X**

(BY MAIL) placing the envelope for collection and mailing on the date and at my address shown above following our ordinary business practices. I am completely familiar with Dietrich, Glasrud, Mallek & Aune's practice of collection and processing of correspondence for mailing. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in declaration.

\_\_\_\_\_ (BY OVERNIGHT MAIL SERVICE) by placing the envelope for collection following our ordinary business practices for collection and processing correspondence for mailing by express or overnight mail to the person(s) by whose name an asterisk is affixed.

**X**

(BY FACSIMILE) In addition to service by mail as set forth above, the person(s) by whose name an asterisk is affixed was also forwarded a copy of said documents by facsimile.

\_\_\_\_\_ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 30, 2004, at Fresno, California.

*Lori L. Bailey*  
\_\_\_\_\_  
LORI L. BAILEY